(highlight from article)

PENSACOLA
NEWS JOURNAL

SCHOOL ACCUSED OF IMPROPRIETY

Escambia Charter fixed student grades,teachers say

Jenny La Coste

An Escambia Charter School that aims to give students with discipline problems a second chance is under fire, facing allegations that school officials fix grades,employ uncertified teachers' and placed teachers' and students'safety at risk.

Several current and former employees of Escambia Charter school- the first charter school in Escambia county-called for an investigation.

" The things I have heard alarm me," said Charles Thomas, the Director of alternative education. They are serious, and I take them seriously" The school employs about 10 teachers to serve a student population of about 150 students. About 75 teachers have left the school in the past three years. Teachers point to the high turn over as an indication of problems.

The school board of directors heard the allegations last week and asked AmStaff Human resources, the company that leases employees to the school, to conduct an investigation.

See GUN INCIDENT,4A

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(local news article)

GUN INCIDENT WORRIES CHARTER TEACHER

"(The situation) was handled absolutely improperly," she said. Roberts had no idea the boy had a gun. One of the school's administrators called her classroom and asked her to send the boy, with his belongings, to the office. No one was sent . to her classroom to assist, and she wasn't toll about the very real danger that one of her students was armed with a handgun.

The boy was confrontational when she asked him to leave. "Finally, he gets up and walks outside, then he turns, like he's going to reach into his book bag, and I said, Don t do it, " she said. "I didn't put it together until later. I had no idea how much danger I was in, how much danger my students were in."

The boy who initially brought the gun to school was expelled, but Roberts said the student who had it in her classroom and the other ' student who handled it were given light suspensions.

Uncertified teachers

Former teacher Kim Levick said she found out the school employed uncertified teachers during parent-teacher night. Her name was listed on report cards of students she had never taught. "These people are coming up to me and I have to say, 'I'm sorry, I didn't teach your child that class, " she said.Levick and other teachers say their names were used when uncertified teachers taught a class.

By state law, teachers in charter schools must be certified.Artie Davis, who served as the school's assistant principal three years • ago, said he saw similar things happen when he was at the school. Davis said few employees complained for fear of being fired.

"Anyone that disagrees with him (school directorStan Callender) disappears," he said; "It doesn't matter if it's in the middle of the week. It doesn t matter if it's in the middle of Davis the school day. I've sent kids to class only to find there's no teacher there."

Jennifer Ray field, the school's most recent valedictorian, said she was disappointed with the school's academic opportunities. Rayfield, 19, left Washington High because she had a child and needed a more flexible learning environment. She hoped the school . would prepare her for college and a job."When I first got there, there were no books in the classroom, nothing," she said. "The teachers weren't teaching. I did absolutely nothing that first year and I got straight A s, but I wasn't learning anything."

PROBE FINDS PROBLEMS AT THE SCHOOL

Escambia Charter School taking steps to address complaints

Jenny LaCoste
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An investigation into Es-cambia Charter School has revealed numerous red flags in the way the school does business, but the school's board of directors feels most of the problems highlighted in the investigation have been resolved.

AmStaff Human Re-sources, the company that leases employees to the school, investigated allegations made by current and former teachers and reported back to the school's board of directors Tuesday.

The board took no action but directed the school's administrator, Stan Callender — the focus of much of the investigation — to develop policies to help make sure the problems are not recur-ring.

The investigation's findings include:

- Uncertified teachers taught classes last school year, a violation of Florida law.
- Principal Jerome Chisholm admitted to taking alcohol to the school on two occasions and drinking it with teachers. He said students already were gone for the day. Possession and/or use of alcoholic beverages in the workplace violates AmStaff's Drug-Free Workplace policy.
- Callender took school school power washer for personal use. Callender said he took the equipment home so it wouldn't be stolen and that since that time the board has approved a policy that does not allow staff to take equipment home.
- Callender has addressed staff members in a nonpro-fessional manner.

Charter schools are public schools funded with tax dollars but operated by private individuals or groups. A board of directors oversees school polices and operations.

Escambia Charter, the counties oldest charter school has been open for eight years- caters to students who have been suspended Or expelled from the traditional, public school system, or students who do not perform well in traditional settings.

Local school boards approve charter contracts but have no input in a school's day-today operations. School boards review charter school contracts annually and can terminate a contract if the health, welfare or safety of students is in Jeopardy.

like around the neck.

Q. And what did he do?

A. Tried to get me off.

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Q. How did he do that?

A. Trying to pull me off.

Q. And what did he do to you?

A. I jumped off then. He didn't get me all the way off. I got off by myself.

Q. Did you touch Mr. McWilliams when you walked up behind him?

A. Yes.

Q. How did you touch him?

A. That's when I just jumped up on him.

Q. Show the Judge how you jumped on him.

A. This is Mr. McWilliams facing the other class. I jumped up on him and I put my arms around his neck.

Q. When you say you jumped on him, you put your arms around him?

A. Yes.

Q. Is that correct?

A. Yes, sir.

A. You didn't jump up like somebody doing a piggy-back?

A. Yes, that's how I did it. I jumped on his back.

Q. Show me again what you did. Let me

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be Mr. McWilliams.

A. I'm not really going to do it, though.

Q. I understand. Just show the Judge.

A. This is Mr. McWilliams.

Q. Am I facing away from you?

A. Yes.

Q. As Mr. McWilliams. Go ahead.

A. I jumped up and I grabbed him around his neck like this and I was hanging on his back.

Q. Okay, fair enough. And that's all you did?

A. Yes.

Q. And then what did he do to you?

A. He took his arm and he reached back and he tried to get me off, so then I just got off.

Q. I understand. Did he lift you up off the ground?

A. Well, he tried, but I don't think he did.

Q. After Mr. McWilliams let go of you what did he say to you?

A. He said that was enough

horseplaying, for us to stop before we get wrote up.

Q. When you put your arms around Mr. McWilliams' neck like you did to me just then, did Mr. McWilliams tell you don't do that, let go of me, or anything of that sort?

A. He said let go and stop.

Q. I'm sorry?

A. He said let go and stop.

Q. He said let go and what?

A. He said let go, stop.

Q. And then what did you do?

A. I let go and got off.

Q. Before he tried to get you off, did he tell you to stop touching him?

A. Before I got up there?

Q. No. When you got up there and put your arms around his shoulder, did he say something to you?

A. Yes.

Q. What did he say?

A. Get off and stop.

Q. And what did you do?

A. I let go and got off.

Q. Okay. Well, did he lift you up or

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do anything?

A. Oh, when I first got up there, he reached back and he tried to get me of, but he couldn't get me up. So that's when he said, stop playing and get off.

Q. That was my question, though. Before he tried to get you off, did he say don't touch me, get off?

A. Oh, no.

Q. It was only after he tried to get you off that he then said don't touch me, get off; correct?

A. It sounds like you keep saying the same thing over and over and I keep getting mixed up.

Q. Well, I understand, but we're talking about the difference between when you first put your arms around him and then he tried to get you off. Up to that point he hasn't said —

A. As soon as I got up there, he didn't say nothing.

Q. But after he tried to get you off, then he said get off?

A. Yes.

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Q. Thank you. Now, when Mr. McWilliams grabbed your arm - - grabbed your arm and put you on the ground, did he hurt it?

A. I was just playing. It stung, but I didn't complain about it

Q. I understand you didn't complain, but did it hurt?

A. No.

Q. Did it leave a rash on your arm?

A. For about a second. You know how when you touch somebody it leaves a little rash or something.

Q. Have you personally observed Mr. McWilliams horseplaying with other students before this incident with you?

A. Many times.

Q. When students start horseplaying with Mr. Mcwiiliams, does he physically horseplay back?

A. Not physically.

Q. What does he do?

A. Say that again.

Q. When you have seen the students horseplay with Mr. McWilliams, what did he do in return?

* * * * *

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A. Tate High School.

Q. When did you leave Tate High School?

A. I got expelled for a weapon on campus and assault and battery.

Q. And how many times do you think you have been suspended from school in total since going to school?

A. Many.

Q. Like how many; more than a dozen?

A. More than that.

Q. Maybe a hundred?

A. Close. I've been suspended from middle school, high school. I was suspended out of fifth grade twice.

Q. Have you had to repeat grades?

A. No.

Q. You haven't had to attend any of the grades over again?

A. No, sir.

Q. And you were suspended from school following the incident with Mr. McWilliams?

A. Yes, sir.

Q. How long?

A. Five days.

Q. Were you - - did you ever have any

conversation with the Principal, Mr. —

A. Oh, I was only suspended for two days for what happened behind his portable, but I also had surgery, so I was out for two weeks. I had my appendix removed.

Q. Did you ever have any in meetings with Mr. Chisolm about this whole incident?

A. I can't remember.

Q. You don't think Mr. Chisolm ever asked you what happened?

MR. NAGIE: Objection; he didn't say that.

THE WITNESS: I'm pretty sure he did. I can't remember. That was a long time ago.

BY MR. VALEN:

Q. And you don't recall any conversations with Mr. Chisolm?

A. Not until I got expelled from Charter. That was the last time I talked to him.

Q. And what was - - you may have said this. What was the reason you were expelled?

A. An incident on the bus.

Q. What happened?

APPENDIX C

SUPREME COURT OF FLORIDA
THURSDAY, MARCH 10, 2005
CASE NO.; SCO5-405
Lower Tribunal No.: 1D03-2849

MICHAEL MCWILLIAMS
Petitioner(s)

vs.

AMSTAFF, ET AL.
Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petifion for Review is hereby dismissed. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy

Test:

/s/ Thomas D. Hall
Thomas D. Hall

av

Served:

HON. JON S. WHEELER, CLERK
MICHAEL MCWILLIAMS
RODERIC GREGG MAGIE
HON. DAVID W. LANGHAM

[SEAL]

SUMMARY OF ARGUMENTS

There was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant's injuries did not "arise out of" work performed within the course and scope of employment as required by Florida Statutes 440.02(36). Further, there was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant failed to prove injuries with medical certainty by objective findings as required by 440.09. Lastly, there was no competent substantial evidence for the JCC to deny temporary partial benefits where Claimant demonstrated a connection between his injuries and a loss of income.

ARGUMENT

I. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSABILITY CLAIMS TO DENY COMENSABILITY ON BASIS THAT CLAIMANT'S INJURIES DID NOT "ARISE OUT OF" WORK PERFORMED WITHIN THE COURSE AND SCOPE OF EMLOYMENT AS REQUIRED BY SECTION 440.02(36).

Although the Judge of Compensation Claims expressly determined that Claimant had not "abandoned his job duties" or deviated from his employment to the extent he was engaged in horse play, the JCC nonetheless erred in deteimining Claimant was not acting within the course and scope of employment when he was physically assaulted by a student while engaged in his normal duties of teaching class to troubled youth. "I find that competent substantial evidence does not support that the Claimant was in course and scope of employment when injury occurred." (I:180). Further, although the JCG expressly determined that physical contact initiated by students upon teachers was reasonably foreseeable, (I:183) the JCC erred by concluding instead that Claimant's "impermissible physical reaction" to being jumped from behind by a delinquent student was the major contributing cause of his injuries.

Vigliotti v. Kmart Corporation, 680 So.2d 466 (Fla. 1st DCA 1996) sets forth a two part test for deteemining com-

pensability in post-1994 workers compensation cases: 1) The claimant must have been peerforming work in the course and scope of his employment, and 2). the work performed by the claimant must be the major contributing cause of the claimant's injury. *Id.* at 467. In *Vigliotti*, the appellant claimant was a door greeter for Kmart who was injured when she slipped and fell after clocking out but before she had left the premises of the store. In response to appellee's argument that the new definition of arising out of under Section 440.02(32), Fla. Stat. (Supp. 1994) required appellant to prove a causal link between an employee's actual work function and the injury, i.e., "the work performed" must be the "major contributing cause" of the injury, this court explained: "We see nothing, however, in the extensive revisions to the workers compensation law to indicate the legislature intended to broaden tort liability of employers in this fashion as a solution to the workers compensation crisis." *Id.* at 467. The court noted that such an interpretaflon of the phrase "arising out of" as advocated by the appellees, would necessarily limit compensability to those injuries occurring during the performance of only primary job duties thereby broadening the potential tort liability for every employer in Florida. *Id.* at 467. Moreover, this court noted such construction would contravene the legislative intent to ensure the prompt delivery of benefits to the injured worker by an efficient and self-executing system.

In the instant case the JCC erred in concluding it was Claimant's physical reaction to the assault which was the major contributing cause of Claimant's injuries. Although the JCC in the instant case expressly determined that the danger to teachers from unprovoked attacks by students was foreseeable, (I:183) by concluding that Claimant's "physical reaction" to a student assault was the major contributing cause of his injuries, the JCC has inadvertently exposed the employer in the instant case to tort liability in contravention to the admonitions of *Vigliotti*. Because the Claimant in the instant case was on the employer premises fulfilling his essential job function of teaching delinquent students when

he was assaulted from behind without warning, and further because such unwelcome physical contact was foreseeable and within the increased zone of risk for teachers employed at Escambia Charter School, the JCC erred in denying compensability and determining Claimant' injuries did not arise out of or occur within the course and scope of his employment. *See, also, Tanguilan v. PMI Employee Leasing*, 832 So.2d 176 (Fla.1st DCA 2002) holding claimant's employment was major contributing cause of his injuries under 440.02(35) where he only momentarily deviated from employment when he lit explosive device while waiting to clock out at the end of the shift. *See, also Orange County MIS Dept. v. Hak*, 710 So.2d 998 (Fla. 1st DCA 1998) holding there may be numerous contributing causes leading to an injury but claimant must establish that the employment~occurrence is the most preponderant cause of the injury.

In the instant case, the most preponderant cause of Claimant's neck injury was simply the act of teaching delinquent students there the risk of being assaulted was a foreseeable part of the job. Because Claimant was performing the essential functions ofhis empplomentwhen the injury occurred the JCC erred in concluding Claimant's injury did not arise out of or occur within the course and scope of employment pursuant to Section 440.02(36).

II. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSATION CLAIMS TO DENY COMPENSABILITY ON BASIS THAT CLAIMANT FAILED TO PROVE HIS INJURIES WITHIN MEDICAL CERTAINTY BY OBJECTIVE FINDINGS AS REQURED BY SECTION 440.09 FLORIDA STATUTES.

On the one hand, the JCC expressly determined that the major contributing cause of Claimant's injuries was his own impermissible act of "throwing David Thompson over his shoulder," in response to being jumped by: the student from behind. "A critical issue is whether Claimant's actions, in causing injury to himself by throwing David Thompson over his shoulder is a deviation from employment as contem-

plated by F.S. 440.02(36)." (I:179). "The fact that Claimant reacted impermissibly and inappropriately to conduct of a stadent is the major contributing cause of the injury." (I:180). However, in the same breadth when challenging the factual predicate of Dr. Lurate's medical opinions on causation, the JCC characterizes Claimant's physical reaction as a failed attempt to grab the student with no evidence Claimant lifted him over his head during the act. (I:181). These two factual characterizations of Claimant's action are inconsistent. Nevertheless, Dr. Lurate testified that the history provided by Claimant was consistent with the injuries he diagnosed Claimant as sustaining.

> "Q: When did you first see Mr. McWilliams, doctor, and what was the history that he presented to you?
>
> A: I have seen him one time, it looks like on November 26, 2002, and the history I got was that. - - I guess, he is a teacher at this wayward school - - or school for wayward kids - - and one of the students jumped him from behind, and in the process of flipping the student off of him, he felt this tearing sensation in his neck, with increased neck pain, and I think, at some point along the way, developed some pain down his arm - - right upper extremity - - originally, treated through workers' comp." (I:125).
>
> Q: Was the injury mechanism, that Mr. McWilliams described to you, a reasonable explanation for the condition you diagnosed and provided treatment?
>
> A: I think it was reasonable.
>
> Q: In other words, within a reasonable degree of medical certainty, was the event that he described, having occurred on October 25, 2002 - - when he flipped the student off of him - - is that, in your estimation, the major cause of the condition that you diagnosed?
>
> A: From what I have to work with, I would say I have no reason to doubt it. It's compatible. (I:129).

Defense counsel questions on cross-examination:

> Q: Okay, and when you use the phrase "flipping him" - - the student, that is - - "overhead," how did you

visualize the mechanism that Mr. McWilliams described to you?.

A: I am envisioning somebody is on my back - - you know, maybe arms around my neck, around my shoulder - - and I kind of reach behind myself, to grab him and shake him, flip him overhead, off of me.

Q: Okay, in other words, over your front, so to speak?

A: Or off to the side or, you know, any way to flip him off of there.

Because the JCC expressly determined that Claimant injured himself when he threw student David Thompson "over his shoulder" (I:179), Dr. Lurate's opinions regarding causation were premised on an accurate factual history when be opined that Claimant sustained herniated disks in his cervical spine when he flipped the student off his back. *Uliman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st DCA 1993) holding not every error or omission in the factual predicate upon which an expert bases an opinion necessarily justifies disregarding that expert's oninion. See, also, Closetmaid v. Sykes 763 So. 2d 377 (Fla. 1st DCA 2000) holding JCC's determination of reasonable medical certainty depends on the substance of the evidence rather than the use of "reasonable medical certainty", terminology, or any other so-called "magic words", by a medical witness. *Id.* at 382.

There was therefore no competent substantial evidence for the JCC to deny compensability on the basis that Claimant failed to prove his injuries with medical certainty by objective findings as required by Section 440.09.

III. THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE FOR THE JUDGE OF COMPENSATION CLAIMS TO DENY TEMPORARY PARTIAL BENEFITS WHERE CLAIMANT DEMONSTRATED A CAUSAL CONNECTION BETWEEN HIS INJURIES AND A LOSS OF INCOME.

In order to prove eligibility for temporary partial disability benefits, a claimant must simply show a connection between his injuries and loss of income. *Jefferson v. Wayne Dalton Corporation*, 793 So.2d 1081 (Fla. 1st DCA 2001). In

the instant case, Dr. Olsen released Claimant back to work with five pound lifting restrictions. (I:178, 179). Dr. Lurate diagnosed Claimant as suffering from herniated disks at C4-5 and C5-6, and testified that if Claimant's condition did not improve he would be a Candidate for an anteriol cervical decompression and fuision at two levels. (l:127). Further. Dr. Lurate imposed restrictions to avoid heavy lifting with his right arm, no repetitive overhead use of the right arm, no overhead work in general, and in fact restricted Claimant to avoid work where he would be required to tilt his head up. (I:12.9). Although the JCC, relying upon the testimony of Stan Callender, determined that Claimant could have returned to work at Escambia Charter School within those restrictions, the record is devoid of any such evidence. In fact to the contrary, the first day after returning to work following his injury Claimant was required to pressure wash the building in clear violation ofthe restrictions imposed by both physicians. (I:21-23). Furthermore, after leaving employment at Escambia Charter School the Claimant conducted an extensive work search and in fact earned approximately two thousand dollars through variqus self-employed jobs. (I:25, 26). The JCC's cynical comparison of the Claimant's work search with the fact that teacher Anna Broxson found employment almost immediately upon leaving Escambia Charter School ignores the fact that Claimant sustained serious on the job cervical injuries before quitting his employment whereas Anna Broxson fortuitously did not.

The JCC therefore erred in denying temporary partial disability benefits to Claimant where he demonstrated through a good faith work search the connection between his loss of income and injuries.

CONCLUSION

There was no competent substantial evidence for the JCC to deny compensability on the basis that Claimant's injuries did not "arise out of work performed within the course and scope of employmept as required by Florida Statutes 440.02(36). Further, there was no competent substantial evidence for the JCC to deny compensability on the basis that

Claimant failed to prove injuries with medical certainty by objective findings as required by 440.09. Lastly, there was no competent substantial evidence for the JCC to deny temporary partial benefits where Claimant dembostrated a connection between his injuries and a loss of income. This court should therefore reverse the JCC's decision and award compensability, temporary partial disability benefits and future medical treatment.

FOR THE FOREGOING REASONS, the Appellant respectfully requests this Court to reverse the JCC's Final Compensation Order of June 13, 2003 and grant Apellant's Motion for Appellate Attorney Fees.

Respectfully submitted,

/s/ [illegible]
Michael J. Valen, Esquire
Florida Bar No.: 997633

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of the foregoing document have been furnished via. U.S. Mail to the District Court ot Appeais, First District of Florida, 301 Martin Luther King Jr. Blvd., Tallahassee, Florida 32399-1850, and one copy to Roderic C. Magie, Esquire, Esquire, 25 W. Cedar Street, Suite 660, Pensacola, Florida 32501, on this 25th day of November, 2003.

/s/ [illegible]
Michael J. Valen

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
OJCC Case No. 02048703PNS

Michael McWilliams
Claimant,

vs.

AmStaff Human Resources and
Liberty Mutual Group

FINAL ORDER DENYING COMPENSABILITY OF CLAIM, PAYMENT OF TEMPORARY INDEMNITY BENEFITS, AND AUTHORIZATION OF SURGERY/TREATMENT WITH AN ORTHOPEDIST

THIS CAUSE was heard before the undersigned at Pensacola, Escambia County, Florida on May 14, 2003 upon the Claimant's claims for compensability, temporary partial disability benefits from the accident date of October 25, 2002 and continuing, as well as authorization of a treating physician. The petition for benefits were filed November 27, 2002 and January 21, 2003. Mediation occurred on February 21, 2003 (86 days after the initial petition was filed), and a pretrial compliance questionnaire was filed April 3, 2003. The final hearing occurred one hundred sixty-eight (168) days after the initial petition was filed. Present in Pensacola, on behalf of the Claimant was Michael Vaten, Esq. Present in Pensacola on behalf of the Employer/Carrier (hereafter "E/C") was Roderic Magie, Esq.

Each party submitted a Trial Summary pursuant to Rule 4.085(c)(U.P.P.).

Submitted into evidence at the Final Hearing were the following documents, each accepted and placed into evidence without any objection except where noted, as joint exhibits, Claimant's exhibits, or E/C exhibits, with each individual exhibit being further identified by a numerical designation as follows:

JOINT EXHIBITS:

1. The deposition of Dr. R. Barry Lurate was marked as Joint exhibit "1" and accepted as evidence.

EMPLOYER/CARRIER EXHIBITS:

I. The Claimant's resignation letter was marked as E/C exhibit "1" and accepted as evidence.
2. Notice of Denial dated November 5, 2002 was marked as E/C exhibit "2" and accerted as evidence.
3. Response to Petition for Benefits dated November 27, 2002 was marked as E/C exhibit "3" and accepted as evidence.
4. Response to Petition for Benefits dated January 27, 2003 was marked as E/C exhibit "4" and accepted as evidence.

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

1. The parties pretrial compliance questionnaire filed April 2, 2003 was marked as Judge's exhibit "1" for the record.
2. The Trial Summary of the Claimant filed May 12, 2003 was marked as Judge's exhibit "2" for the record.
3. The Trial Summary of the E/C filed May 12, 2003 was marked as Judge's exhibit "3" for the record.

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolved this claim. I have not attempted to painstakingly summarize the substance of parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me, and the live testimony of the witnesses who appeared before me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based on the parties' stipulations and the evidence and testimony presented, I find:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. Any and all issues raised by way ofthe PFB's, but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant and, therefore, are Denied and Dismissed with prejudice, See *Betancourt vs. Sears Roebuck &. Company Co.*, 693 So.2d 253 (Fla. 1st DCA 1997).
3. Claimant was a teacher at Escambia Charter School (the "employer" herein) starting in July of 2002. He was hired as a cabinet maker to teach students cabinet making and drafting, and also did some maintenance work. His teaching assignments included six classes, including two drafting classes, a DCT class, and two construction classes. Escambia Charter School is designed for at-risk high school students, "at risk" being defined by the school's president and CEO, Stan Callendar, as applying to any student that has a GPA of 2.0 or less, or is credit deficient for age level and grade level. Mr. Callender further testified that as many as forty percent of the student population had been expelled from other ptiblic schools, and that the remainder are at the school as a result of parent choice. The evidence supports that the environinent at the Employer was different from that prevailing at most high schools. I find that the evidence supports that a percentage of students there were discipline problems and that this was known to the management and the teachers.
4. The Claimant was allegedly injured on October 25, 2002. The facts of that occurrence are in some dispute. Claimant testified that on October 25, 2002 a student, David Thompson, poked him in the right shoulder. Claimant testified that his response was to grab Mr. Thompson's hand. Mr. Thompson testified that he approached Claim-

ant during the class in question and told claimant he was "soft." Mr. Thompson's account supports that Claimant did more than "grab" Mr. Thompson's arm. According to Mr. Thompson, Claimant's response was to grasp Mr. Thompson's arm and twist it until Mr. Thompson was brought down to tile ground. Student Justin Godwin's testimony confirmed Mr. Thompson's description. I accept that Mr. Thompson and Mr. Godwin's account of this is the more credible and believable. Claimant's attempt to minimize his reaction (and omit the "twisting" sufficient to bring Mr. Thompson to the ground) to this provocation by Mr. Thompson causes me to doubt Claimant's credibility somewhat. Mr. Thompson testified that Claimant then told him to stop playing before they got in trouble.

Later that afternoon the incident which is the subject of this claim occurred. At that time Mr. Thompson approached Claimant from behind without warning, and according to Mr. Thompson he jumped on Claimant's back, Claimant tried to lift him off of the ground (though Mr. Thompson did not believe be was ever off the ground); reached behind himself to try and grab Mr. Thompson, and when he could not free himself, then he said to Mr. Thompson "let go," "stop," and that was enough "horse playing, for us to stop before we get wrote up." Mr. Thompson re-enacted part of this in the final hearing, during his testimony. Mr. Thompson testified that when Claimant asked him to stop, after first trying to physically react to being grabbed, that Mr. Thompson just let go and that was it. Claimant characterizes the later events as occurring when he was "restraining" a troubled student who grabbed him from behind. Claimant testified that be was grabbed from behind by Mr. Thompson and so Claimant "hit him with a wrestling move as soon as he hit me and brought him tip over my head and held him there and just laid him down." Claimant says that he "stopped it (the move) right in mid air and slowed it down . . . I just dropped

him down." Claimant said that this action occurred rapidly, in split-second. Claimant denied saying anything from the point where Mr. Thompson grabbed him until Claimant had placed Mr. Thompson on the ground. Mr. Freddie Augustine was also a teacher at the Employer. On the date of this incident, Mr. Augustine saw Mr. Thompson "just came over and grabbed him by the arm," and Claimant "told him to leave or go, or something of that sort." Mr. Augustine did not recall seeing Claimant "throw a wrestling maneuver unto the student." Claimant's account of this second "grabbing" incident is at odds with Mr. Thompson's testimony and is not supported by Mr. Augustine, another teacher who was present, and who cannot recall Claimant lifting Mr. Thompson over his head. I find that such a display (holding a teenager over your head) would be noticeable and at least somewhat memorable, and find it persuasive that another teacher who was present does not recall it occurring. However, it is also persuasive that Mr. Chisolm (see below) recalls Claimant telling him the next day that he lifted Mr. Thompson over his head. This temporally proximate rendition of this description supports that Claimant has rendered a consistent descripton of his perception of the facts since the incident. Considering all of the evidence and weighing credibility, I find that the weight of the testimony support's Mr. Thompson's version of the facts of the "grabbing" incident which is the subject of this claim. While Claimant resisted the grab and tried to free himself, I find that be did not lift Mr. Thompson over his head and set him down as attested by Claimant.

The witnesses' testimony is consistent in establishing that this grabbing occurrence was shortly before the bell for the end of the school period and coincidently the end of the school day. When Claimant went to the school office that afternoon, there was no one present to whom he could report the incident. The next day, a Saturday, Claimant and the Principal of the school, Mr. Jerome Chisolm, were both present on Sat-

urday morning for a scheduled event. Claimant approached Mr. Chisoim, and told him that "David (Mr. Thompson) was goofing around and jumped on me," and hurt my neck. Mr. Chisolm testified that on Saturday morning Claimant "casually said that he had hurt his neck from the day prior from throwing David Thompson over his head." At that time, Claimant did not report that he had been "attacked" or "assaulted." At trial Claimant characterizes the incident as being "attacked" by Mr. Thompson. Mr. Chisolm concluded from Claimant's description of the activity that Claimant and Mr. Thompson were engaged in horseplay and that the event was not work related.

5. The principal of Escambia Charter School, Mr. Jerome Chisolm, also testified that it was not uncommon for students to use profanity, engage in horseplay, and generally act up in class.

However, Mr. Callendar denied that horseplay has been a problem at the Employer. Mr. Chisolm testified it was against school policy for both teachers and students to initiate physical contact with one another. That policy was known to the teachers and had been discussed in an earlier meeting of the teachers. Ms. Anna Broxson, a former teacher at the Employer, testified that she witnessed numerous occasions of students initiating physical contact with teachers. She testified that she wrote up disciplinary reports on several of the students on a regular basis for violations of school policies. Claimant also testified that he had written students up. In addition to the school policy discussion at this meeting, Claimant had been specifically talked to about touching students. That conversation arose when Claimant had expressed frustration about the students and intimated that he had felt like "swinging" on one. In that conversation, the school leadership specifically counseled Claimant not to strike or touch a student, and cautioned him of the possible consequences, legal and otherwise, of doing so. All of the knowledgeable

witnesses confirm this. Claimant knew not to touch students, and to refrain from a physical reaction if such occurred. On previous occasions, Claimant had acted appropriately when a student had touched him, telling the student to stop or go away. The testimony of Ms. Broxson, Mr. Augustine, Mr. Callendar and Mr. Chisolm, and Claimant himself clearly demonstrated this knowledge. Horseplay between students and teachers was not allowed or condoned at Escambia Charter School. Claimant knew the proper approach to David Thompson, in response to Thompson's touching of him, was to tell him to stop and not physically react.

6. The following Monday, Claimant was still in pain and complained again to Mr. Chisolm, and expressed doubts about his ability to work that day. Later that week, because no paperwork had been provided to him for completion, Claimant notified Cindi Opachick of AmStaff, who is the staff payroll company that insures Escainbia Charter School for workers' compensation claims, of the incident and requested Medical care for the injury to his neck. An appointment was then scheduled for Claimant to see authorized physician, Dr. J. Ole Olsen, who released Claimant back to work with five pound lifting restrictions. Because the Claimant felt incapable of continuing to work in what be perceived to be an unsafe environment with the inability to defend himself against students, he resigned his position as teacher on November 7, 2002.

7. A critical issue is whether claimant's actions, in causing injury to himself by throwing David Thompson over his shoulder is a deviation from employment as contemplated by F.S.440.02(36) ("Arising out of" pertains to occupational causation. An accidental injury or death arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury or death.). A occurrence similar to that is this case, where emotions got the better of reason, is set forth in *Linwood Allen Jones vs. International Pa-*

per Company/Sedgwick James, a District A-West case affirmed by the First District Court of Appeals (a copy of that compensation order and the Appellate Order affirming same are attached hereto and incorporated by reference). In the Order Denying Compensability of Claim arid Payment of Medical Expenses dated July 9, 2000, Jones was found to have been engaged in what was admittedly a part of his job, escorting an uninvited visitor to Jones' work station off the premises. The major contributing cause of the injury to Jones, however, was his anger and frustration at the uninvited visitor, a girlfriend, which anger and frustraflon caused Jones to use excessive force in opening a swinging door through which he and the guest had to exit the premises. Jones projected his right hand with such force that he drove it through the wire enforced one quarter inch glass in the door, severely injuring himself. That action of thrusting his hand through the glass was only a momentary or fleeting deviation from an appropriate job function of escorting the visitor. The Order was appealed and affirmed on a *Per Curiam* basis by the First District Court of Appeal. In the instant case there is a similar coupling of routine job actvities with an un permitted, excessive use of force against a student, causing injury to the teacher. The fact tbat claimant was in a classroom setting, monitoring and supervising students, including unruly students, is not the major contributing cause of the injury.

The fact that Claimant reacted impermissibly and inappropriately to conduct of a student is the major contributing cause of the injury (except for the absence of competent medical opinion testimony to establish the causation, see below). If Claimant had sent Mr. Thompson to the Dean after he was poked in the shoulder and called "soft," the second incident would not have occurred. If claimant had not reacted physically to a student putting his arms around the teacher, but had simply told the student to desist, the injury would not

have occurred. *City of North Bay Village vs. Millerick*, 721 So.2d 1230 (Fla. 1st DCA 1998). This is supported by the credible testimony of Mr. Thompson that when Claimant did ask that he let go, Mr. Thompson immediately did so. Being injured on the premises of the employer is not controlling as to an injury being compensable. *Madden vs. Walt Disney World Company*, 711 So.2d 150 (Fla. 1st DCA 1998); Admittedly, Claimant's action in attempting to free himself was momentary. However, it was no more momentary than the actions in *Jones*, and was a continuation of his earlier inappropriate behavior. I find that the competent evidence does not support that the Claimant was in the course and scope of his employment when he injury occurred. On the basis of lack of substantial competent evidence, I deny the compensability of the claim under F.S. 440.02(36).

8. Claimant says that when he was grabbed, he lifted Mr. Thompson overhead and set him down, injuring his own neck. This testimony is consistent with what he told his supervisor the next morning, and with the history be later provided to Dr. Lurate. I have observed he demeanor of the witnesses and I conclude that Claimant did not lift Mr. Thompson over his head and set him down (see above). Dr. Lurate recorded a history of Claimant being grabbed from behind, bending down, and "lifting the student over my head." Dr. Lurate concluded from his examination, review of diagnostic tests, and the history provided by Claimant that the incident was the major cause of the Claimant's right C4-5 and C5-6 herniated disc. The determination of major contributing cause is a legal determination upon which expert medical evidence may be persuasive. *Closet Maid v. Sykes*, 763 So.2d 377 (Fla. 1st DCA 2000). Clearly "[c]ausation of non-observable injuries is essentially a medical question." *Lindsay v. TVS Trucking Co., Claims Center*, 565 So.2d 864 (Fla. 1st DCA 1990); *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st

DCA 1993). I find the causation of injury to be questionable in this case because the history (lifting a student overhead) which Claimant provided to Dr. Lurate and which he rendered at trial is not credible or believable. Where the factual predicate is flawed, the opinion maybe rejected. *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 868 (Fla. 1st DCA 1993). The Court held "Of course not every error or omission in the factual predicate upon which an expert bases an opinion necessarily justifies disregarding that expert's opinion. On the other hand, some facts are so critical to the validity of the opinion as to dictate the opposite result, namely, rejection of the expert opinion. In a given case, therefore, the question ultimately will resolve itself into a judgment call by the trier of fact; and, on review, the exercise of this judgment should be entitled to the same presumption of correctness as other factual conclusions made by the trier of fact, and should not be reversed except upon a showing of abuse of discretion.)" In *Ullman v. City of Tampa Parks Dept.*, 625 So.2d 863 (Fla. 1st DCA 1993), the requirement of asking the expert what effect the misrepresentations or flaws would have had on her/his opinion(s), was also rejected. Instead, *Ullman*, the Court adopted for workers' compensation cases, and applied, the standard for civil cases enunciated by the Florida Supreme Court in *Easkold v. Rhodes*, 614 So.2d 495 (Fla. 1993), According to this standard, the Office of the Judge of Compensation Claims is not compelled to accept the conclusions of the expert(s) where that opinion or conclusion is not supported by a proper factual predicate. Dr. Lurate was not asked what his opinion was regarding the causation of Claimants neck complaints assuming the Claimant resisted and tried to grab Mr. Thompson (and failed), but did not lift Mr. Thompson over his head. Because I find the credible evidence does not support the factual history provided to Dr. Lurate, I find that the causation of Claimant's injuries has not been proven to a reasonable degree of medical certainty by objective medi-

cal findings as required by Fla. Stat. §440.09. I have considered all of the evidence in reaching this conclusion, including the lay testimony of the onset of pain. However, the only testimony of the onset of pain/symptoms is that of Claimant (whose testimony regarding the lifting of the student overhead I have already determined to lack credibility). On the basis of the lack of competent expert testimony, based upon an accurate history of the facts of the incident to establish causation to a reasonable degree of medical certainty, I would deny compensability of this claim.

9. The E/C asserts that Claimant was engaged in horse play and that the horse play caused the injury. The "horse play" doctrine operates to deny compensation to an employee, who, although at work, engages in playful activity that is substantial enough to amount to a deviation from employment. *Times Publishing Co. vs. Walters*, 382 So.2d 720 Fla. 1st DCA 1980). *Walters*, sets forth the factors to be considered in determining whether an employee's horseplay is substantial enough to preclude compensability. These are (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (whether it involved an abandonment of employinent duties), (3) the extent to which similar activity had either been forbidden or had become an accepted or tolerated practice, and (4) the extent to which the horseplay may have been expected or reasonably foreseeable. The extent of the deviation is a key inquiry. *Times Publishing Co.* involved a momentary deviation without obvious danger, which occurred during a lull in work with no abandonment of employment duties. The extent of deviation (1) in this case was substantial. Claimant clearly violated the school policy against physical contact with students, and with the earlier arm twisting he risked causing injury to the student whose care and supervision he was charged with. The completeness of the deviation (2) is a more difficult question. Claimant bad not abandoned his job

duties, was not ignoring the other students, and did not leave the area his class was in. The practice of touching students was clearly impermissible and all of the teachers clearly knew that. Teachers testified that students touching them was also clearly not permitted and that students were written up and disciplined for such touching. Although Mr. Callendar testified that "horse play" was not a problem at the school, it was a problem with Claimant. In spite of this, however, the Employer had not disciplined Claimant in any significant way (beyond some verbal counseling in conjunction with discussion of other matters). Claimant did not discipline Mr. Thompson when he was poked, but instead responded in kind and twisted Mr. Thompson's arm, somewhat violently. Mr. Thompson was left with the impression that they were "playing" around and that it was permissible as long as the Dean did not catch them. Claimant did not enforce order, and then send Mr. Thompson to the dean or write him up, or otherwise discipline him for the poking. The touching of Claimant (poking) by this student, and the reciprocal touching of the student (twisting) by Claimant was accepted by each, in violation of the school rules. I find that the similar activity (3) was clearly forbidden. The instances of past touching, for which students had been disciplined or written up, were supported by various evidence from teachers and management. Therefore, while not accepted or tolerated, the evidence supports that such physical contact was reasonably foreseeable (4).

Thus of the four factors enunciated in *Times Publishing Co.*, the extent of the deviation and forbidden factors each support a finding of horseplay. Similarly, the completeness and the forseeability factors support a finding of this deviation not constituting horseplay. Thus the question of whether this incident amounts to horseplay is a close question. Claimant's reaction was neither appropriate nor professional. Claimant's reac-

tion was a deviation from his teaching duties, as confirmed by Stan Callendar, president and CEO of the school, as well as Jerome Chisolm. Although the deviation was brief, the failure to adopt a rationale approach to the situation is the proximate cause of claimant's injury.

Claimant argues that the horse play question is controlled by *Dunlevy v. Seminole County Dept. of Public Safety*, 792 So.2d 592 (Fla. 1st DCA 2901). There, the JCC denied compensability of an injury because it was sustained during horseplay. The claimant was a firefighter who had engaged in "roughhousing" with a fellow employee as the claimant was going off duty and the other was coming on duty. The Court of Appeal reversed the JCC's finding that the claimant's claim was not compensable because of roughhousing. As noted by the Count in *Dunlevy* in addressing the issue of deviation

> We conclude that these facts are more consistent with case law in which the courts have found that a momentary deviation from work duties does not rise to the wholesale abandonment necessary to bar a claim based upon the doctrine of horseplay. See, e.g., *Boyd v. Florida Mattress Factory, Inc.*, 128 So.2d 881 Fla. 1961); *Jean Fluet, Inc. v. Harrison*, 652 So.2d 1209 (Fla. 1st DCA 1995); *B & B Cash Grocery Stores v. Wortman*, 431 So.2d 171 Fla. 1st DCA 1983); *Times Publ'g Co. v. Walters*, 382 So.2d 720 Fla. 1st DCA 1980). *Dunlevy, supra* at 594.

Claimant asserts that injuries arising even out of one's own "stupidity" are compensable. A lack of common sense has not been a complete defense in this area of workers' compensation law. *Jean Fluet, Inc. v. Harrison*, 652 So.2d 1209 (Fla. 1st DCA 1995). See also, *Tanguilan v. PMI Employee Leasing*, 832 So.2d 176 (Fla. 1st DCA 2002) (holding that a claimant who only momentarily deviated from his employment when he lit an explosive device while waiting to clock out at the end of his shift was compensable).

The E/C asserts that the "horse-playing" engaged in by Claimant in this case is not the type of "horse play" which occurs in "clocking out" and "enforced lull" time cases, which generally are considered minor deviations and, therefore, compensable. *See generally, Tanguilan vs. PMI Employee Leasing*, 27 Fla. Law Weekly D2494; *Dunlevy vs. Seminole Couny Dept. of Public Safety*, 792 So.2d 592 (Fla. 1st DCA 2001). "Enforced lull time" cases include: *Times Publishing Co. vs. Walters*, 382 So.2d 720 (Fla. 1st DCA 1980); *B & B Cash Grocery Stores vs. Wortman*, 431 So.2d 171 (Fla. 1st DCA 1983); *Ivy H. Smith vs. Kates*, 395 So.2d 263 (Fla. 1st DCA 1981). The E/C argues that the facts of this case are instead more analogous to those in a forty year old case, *City of Miami vs. Granlund*, 153 So.2d 829 (Fla. 1963). Distinct from the "clock out" and "lull time" cases, *Granlund*, involved an automobile inspection worker picked up the pistol of a police officer who appeared to have just unloaded all the cartridges. The worker put the weapon to his own head and pulled the trigger, discharging a bullet which the officer had overlooked. The Supreme Court concluded the employee's conduct was foolhardy and constituted "horse play" of such substantial character as to amount to an abandonment of his employment. In *Dunlevy*, the First District Court of Appeal cites Granlund and notes "in those cases where the horseplay doctrine has been applied to deny benefits, the facts show that the claimants significantly departed from standard employee behavior."

I note from Mr. Chisolms' testimony that teachers are told not to joke around with or to try to he friends with the students. He also testified that Claimant's class was all male and he acknowledged that some level of "male bonding" might be expected, in his testimony regarding his impression when the incident was reported that the teacher and student were so engaged at the time. It is also persuasive that this class, on this day, seems to have included some degree of "lulls" from

the testimony of Mr. Thompson. Considering all of the four factors carefully and weighing the importance of each, I find that the Claimant's actions of trying to get Claimant off of his back in this case were wholly inappropriate and a violation of the school rules. In light of Claimant's prior neck injury and his level of education, the actions were inexplicable and ill advised as well. The departure was momentary however, and do not rise to level of "abandonment of employment" as found in *Granlund*. I conclude that the facts of this case do not rise to the level that the horseplay doctrine would preclude a finding of compensability.

10. In addition to the compensability defenses, the employer/carrier has raised defenses of voluntary limitation of income; refusal of employment suitabe to claimant's capacity, and failure to demonstrate a causal connection between the injury and subsequent temporary wage loss. I find that even if the claim was deemed compensable, claimant has not established a claim for temporary indemnity benefits. Claimant has failed to show that his post-injury physical capabilities preclude adequate performance of his teaching job with the employer, from which claimant resigned shortly after the injury. Facts supportive of this conclusion include the unrebutted testimony of Stan Callendar, president and CEO of Escambia Charter School, that claimant could have retained his job with the employer if he had not quit; physical restrictions allowing claimant to return to work as a teacher; subsequent improvement of claimant's condition following the injury, according to claimant's IME physician (Dr. Lurate) who was the only medical expert to testify, in commenting on claimant's ability to bench lift up to 275 pounds; and claimant's failure to look for numerous teaching opportunities in Escambia County and Okaloosa County. *Vencor Hosp. vs. Ahles*, 727 So.2d 968 (Fla. 1st DCA 1998); *STC/Documentation vs. Burns*, 521 So.2d 197, 198 (Fla. 1st DCA 1988); *City of Claremont vs. Rumph*,

450 So.2d 573, 576 (Fla. 1st DCA 1984); *Interim Services vs. Levy*, 28 FLWD 546; *Mason vs. Home Shopping Network*, 28 FLWD 492. It is persuasive that Claimant has not tried to look for work in the Escambia County School system, or even contacted that school district regarding full time or substitute teaching employment. Of note, Ms. Broxson also quit work at the Employer during the same school year (January 2003) that Claimant did and almost immediately (in January 2003) became employed full time as a math teacher with the Escambia County Schools. Whether Claimant would have enjoyed similar success will never be known only because be never made any contact with that school system to inquire or try. I find that even if the claim for compensability of the neck injury were granted, the claims for temporary indemnity benefits would be appropriately denied on the basis of this voluntary limitation of income and Claimant's failure to demonstrate the wage loss is causally related to the injury(ies) and/or resulting restrictions. *Vencor Hosp.*

Wherefore, it is ORDERED AND ADJUDGED:

1. Claimant's claim for compensability of his neck injury is DENIED. As to this claim, the E/C shall go forth without day.

DONE AND ORDERED in Chambers, Pensacola, Escambia County, Florida on this 13th day of June, 2003.

/s/ [illegible]
Judge of Compensation Claims

[SEAL]

CERTIFICATE

This is to certify that the above FINAL ORDER DENYING COMPENSABILITY OF CLAIM; PAYMENT OF TEMPORARY INDEMNITY BENEFITS, AND AUTHORIZATION OF SURGERY/TREATMENT WITH AN ORTHOPEDIST was entered on the date stated, and that copies were mailed to the parties counsel as set forth below.

/s/ [illegible]
Assistant to the Judge of
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